STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

FORMAL COMPLAINT NO. 73

HON. JAMES P. NOECKER
Judge, 45th Circuit Court
Centreville, MI 49032
_____/

DECISION AND RECOMMENDATION

At a session of the Michigan Judicial Tenure Commission, held on August 4, 2004, at which the following Commissioners were

PRESENT: James Mick Middaugh, Chairperson
Hon. Barry M. Grant, Vice Chairperson
Richard Simonson, Secretary
Henry Baskin, Esq.
Carole L. Chiamp, Esq.
Hon. James C. Kingsley
Hon. Kathleen J. McCann
Hon. Jeanne Stempien
Hon. Michael J. Talbot

I. INTRODUCTION

On April 30, 2004, the Michigan Judicial Tenure Commission ("Commission") received findings of fact and conclusions of law from the master appointed by the Supreme Court to hear the evidence in this matter. Having reviewed that report, all the exhibits, and the briefs, and having considered the oral arguments of counsel, the Commission adopts the master's report. The Commission concludes, as did the master, that Judge James Noecker ("Respondent") failed to credibly report the events of March 12, 2003, including while under oath in these proceedings, and engaged in misconduct contrary to the judicial canons. Accordingly, the Commission

recommends that the Supreme Court remove Respondent from the office of judge of the 45th circuit court.

II. PROCEDURAL BACKGROUND

A. Factual Background

Respondent is a judge of the 45th Circuit Court, St. Joseph County, Michigan. At approximately 5:20 p.m. on March 12, 2003, he drove into the parking lot of the Klinger Lake Party Store at the northwest corner of US-12 and Klinger Lake Road, and collided with the building, causing $15,000 - $20,000 in damages. Evidence at the scene and a blood alcohol test given two hours later indicated that Respondent had been drinking.

B. Procedural background

On August 20, 2003, the Commission filed a three-count complaint against the Hon. James P. Noecker ("Respondent"), 45th Circuit Court Judge, Centreville, Michigan. Count I of the complaint alleged that Respondent had persistently abused alcohol, and that the work of the court had suffered as a result. Count II alleged that Respondent had consumed alcohol prior to an automobile collision at the Klinger Lake Party Store on March 12, 2003, and that alcohol was a factor in that collision. Count III alleged that Respondent had made false statements to the Commission.

The Respondent filed an Answer on or about September 16, 2003. The Michigan Supreme Court entered an Order on September 3, 2003 appointing retired 2nd Circuit Court Judge John N. Fields to serve as master in this case. Various telephone conference calls between counsel and the master, a pre-trial conference and hearings, and a series of public hearings were held. Counsel stipulated (a) to submit written closing arguments; (b) to submit proposed

findings of fact and conclusions of law; (c) to have the right to file a rebuttal argument; and (d) to extend the period within which the master shall submit his report to April 30, 2004.

On April 30, 2004, the master filed his report, finding that Respondent had engaged in the judicial misconduct alleged in the formal complaint. A copy of the master's report is appended to this Decision and Recommendation as Attachment A. Based on the findings of fact and conclusions of law contained in that report, the Commission filed a petition for the interim suspension of the Respondent on May 4, 2004. The Supreme Court granted that petition on May 28, 2004, effective June 1, 2004. As noted, the Commission adopts the master's report.

III. STANDARD OF PROOF

The standard of proof in judicial disciplinary matters is by the preponderance of the evidence. *In re Ferrara*, 458 Mich 350, 360 (1998).

IV. DISCIPLINARY ANALYSIS

A. *Brown* factors

The Michigan Supreme Court set forth the criteria for assessing proposed sanctions in *In re Brown*, 461 Mich 1291, 1292-1293 (1999). A discussion of each relevant factor follows.

(a) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.

Respondent has a history of alcohol abuse. As a result of that abuse, Respondent engaged in a persistent pattern of administrative failures. During the course of this official investigation, he made a series of conflicting, often incredible, statements to the police, the media, and the Commission. Respondent misled the master regarding his consumption of

alcohol prior to the March 12, 2003, collision. Respondent's conduct has had a negative impact on the judiciary and interfered with the proper functioning of the disciplinary system.

(b) misconduct on the bench is usually more serious than the same misconduct off the bench

Respondent's abuse of alcohol, even when it occurred off-the-bench, had an impact on his ability to hear matters, render timely decisions and file required reports with the State Court Administrative Office.

(c) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety

Respondent's abuse of alcohol, the impact on the administration of his court, and his inaccurate statements regarding the collision, adversely affected the actual administration of justice.

(d) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does

Respondent's involvement in the collision, his misrepresentations to the police, and the impact of alcohol on the performance of his judicial duties implicated the actual administration of justice and created an appearance of impropriety.

(e) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated

Respondent attempted to conceal that he had been drinking prior to the collision. His version of events was not consistent with eyewitness accounts, and he was not candid with the

police or the Commission. His pattern of conduct, particularly his conflicting and increasingly incredible explanations, was more egregious than conduct which occurs spontaneously.

(f) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery

Respondent did not give an accurate or credible explanation of his conduct during the course of the Commission's official investigation into this matter, including while he was under oath during the hearing on the formal complaint. Respondent's conduct has had a negative impact on the judiciary and interfered with the proper functioning of the disciplinary system.

(g). Additional Factors

The Supreme Court stated that factors enumerated in *Brown* were not exclusive and recognized the Commission's ability to consider other "appropriate standards." *Id*, at 1293. The Commission has accordingly also considered Respondent's discipline record, his reputation, and his years of experience, which are additional factors listed by the American Judicature Society.[1]

Respondent has had extensive prior involvement with the disciplinary system. He was admonished by the Commission for taking some sixteen months to decide a divorce case following completion of trial. He was admonished for taking more than a year to decide a motion to withdraw a guilty plea, and for failing to file any of the required MCR 8.107 reports in 1991. Respondent was also admonished in four additional matters, which included failure to timely decide applications for leave to appeal and persistent failure to file MCR 8.107 reports. Respondent was further admonished for failing to respond to a motion for re-sentencing.

[1] "How Judicial Conduct Commissions Work," American Judicature Society, 1999, p 15-16.

Respondent has been on the bench for over 23 years, and has been a public servant for even longer. His extensive judicial experience is another aggravating factor in evaluating his misconduct, since he is well aware of the conduct expected of a judge.

B. Respondent should be removed from office

1. Respondent's failure to be truthful requires his removal

Respondent has been less than candid regarding his actions the night of March 12, 2003. He misled the police, he was not forthcoming under oath to the Commission, and he failed to offer credible testimony while under oath in the public hearing.

In *In re Ferrara*, *supra*, the respondent made numerous half-truths and misleading statements to the master. She also falsified an exhibit and tried to have it received into evidence. In ordering the respondent's removal from office, the Supreme Court spoke about the significance of that misconduct as follows:

> Her statements to the press and the public, as well as to the Master and this Court, have clearly prejudiced the administration of justice, evidence a fundamental lack of respect for the truth-seeking process, and, furthermore, if left unrebuked, threaten to severely compromise the public's confidence in the judiciary's integrity. Accordingly, we find Respondent's actions to constitute misconduct in violation of Canons 1, 2A, 2B and MCR 9.205(C)(4). [*Id.,* 458 Mich at 364-365.]

In *In the Matter of Ryman*, 394 Mich 637 (1975), the respondent continued practicing law after becoming a judge. In the hearing on the formal complaint, the respondent was untruthful before the master about his continued law practice. He also misled the State Bar Grievance Board (the attorney discipline board of its time). The Supreme Court agreed with the Commission's findings, and removed the respondent from office, declining even to allow the filing of a motion for rehearing.

The Michigan Supreme Court also suspended a judge for six months for, among other things, making false statements to police. The judge was interviewed in connection with a criminal investigation and made false statements. The Court took this disciplinary action even though the respondent had provided correct information to the police two days later. *In re Chrzanowski*, 465 Mich 468, 471, 490 (2001).

The law of other jurisdictions is similar. A New York State judge was removed from office for promising a former political leader that a case would be adjourned at his request and for exacerbating his misconduct by not being candid with the FBI. *In re Levine*, 545 NE 2d 1205 (1989). A judge was removed for a variety of improper conduct which was ". . . compounded further by petitioner's lack of candor . . ." with respect to the motivation underlying his actions, including testimony that was evasive, incredible and false. *In Matter of Gelfand*, 70 NY2d 211, 215 (1987). In *In re Leon*, 440 So2d 1267 (Fla 1983), the respondent failed to tell the truth on several occasions, and the case focused on that conduct which involved Respondent's falsehoods made to the commission in an *ex parte* communication with another judge. While the respondent later recanted his misstatements, the Florida Supreme Court removed the judge, stating: "The integrity of the judicial system, the faith and confidence of the people in the judicial process, and the faith of the people in the particular judge are all affected by the false statements of a judge." *Id.,* 440 So2d at 1269.

Misconduct charges lodged against Florida Judge Irwin Berkowitz involved election campaign improprieties, misuse of accounts while practicing law and "giving willfully deceptive testimony" before the Florida Judicial Qualifications Commission. *In re Berkowitz*, 522 So2d 843 (Fla 1988). In removing Judge Berkowitz, the Florida Supreme Court noted that the commission " . . . found that Berkowitz's willful deception by itself, sufficient to warrant

removal." *Id.,* 522 So2d at 843, (emphasis added). The Florida Supreme Court agreed that not telling the truth to the commission was very serious and quoted from the excerpt in *In re Leon, supra*, about the adverse effects of a judge making false statements. *In re Berkowitz*, *supra*, 522 So2d at 843.

The Louisiana Supreme Court recently removed a judge for campaign misconduct and not being truthful to the commission, even though the respondent belatedly told the truth. The court noted that "lying to the commission" in a sworn statement, which was part of an investigation, was conduct the Louisiana Supreme Court would not tolerate. *In re King*, 857 So 2d 432, 449 (2003). In the case at bar, Respondent stated in his answer to the 28-day letter (Exhibit 51) that he had not been drinking before the collision. He denied that alcohol was a factor in the accident. He gave a similar answer to the formal complaint. Witnesses to the accident, however, indicated that Respondent's face was red, his gait was wobbly, and his manner of walking indicated that he had been drinking, and a blood alcohol test done two hours after the collision revealed a blood alcohol level of .10. The master found, and we agree, that Respondent's claim that he had not been drinking was not credible.

2. Respondent's delays caused a deleterious effect on the administration of justice in St. Joseph County.

Delay in handling matters and docket management was addressed by the Michigan Supreme Court in *In re Hathaway*, 464 Mich 672 (2001) and *In re Seitz*, 441 Mich 590 (1993). In *Seitz*, the Respondent, among other things, neglected the adoption docket and refused to respond to requests by the SCAO. The Supreme Court removed Judge Seitz and adopted the Commission's findings as follows:

> The Master found and the Commission agreed that Judge Seitz's behavior in the handling of the adoption cases constituted misconduct in office. More specifically, the Commission found a persistent failure to perform judicial duties pursuant to MCR 9.205(C)(2); . . . a violation of the high standards of conduct necessary to preserve the integrity of the judiciary pursuant to Canon 1 of the Code of Judicial Conduct; a failure to dispose of business promptly contrary to Canon 3A(5); and a persistent failure to diligently discharge his administrative responsibilities, maintain professional competence and judicial administration . . . contrary to Canon 3B(1). [*Seitz*, 441 Mich at 620-621. (Footnotes omitted).]

Similarly, in *Hathaway*, 464 Mich at 681, the Court imposed a six-month suspension without pay, quoting approvingly from the Commission's findings:

> Respondent's constant and repeated adjournments of proceedings without good cause, as exemplified in the case of *People v Ketchings*, as well as repeated unnecessary and unexcused absences from judicial responsibilities during normal court hours were inappropriate. *Likewise, Respondent's overall lack of industry and proper management of her court docket as well as an unwillingness to take corrective action or accept constructive suggestions or assistance to improve case management, constituted a hindrance to the administration of justice and gave the appearance of impropriety*, all contrary to Canons 1 and 3 of the Code of Judicial Conduct and MCR 9.205(A) and (C)(2) and (4). [*Id.,* emphasis supplied.]

Respondent emphasizes that the Request for Investigation in this case originated with the State Court Administrative Office, and not with a lawyer, litigant, or other participant in the judicial system. Similarly, a number of attorneys testified favorably on Respondent's behalf, noting his dedication, intelligence, and accessibility. With all due respect to those witnesses and to Respondent's position, the testimony does not change the fact that the docket and the public suffered.

In *In re Ferrara, supra*, respondent, who was charged with making anti-Black and anti-Arab comments, nonetheless was able to produce a number of witnesses who were African-American or of Arab descent who testified that they saw no discriminatory conduct and heard no discriminatory language from her. *Id.,* 458 Mich at 357. However, what was at issue in *Ferrara* was not what those witnesses *did* ***not*** hear but, rather, what other witnesses heard.

Similarly, in the case at bar, regardless of the glowing reports from a few attorneys, the overwhelming evidence is that the docket suffered, and that it did so as a result of Respondent's failure or inability to do his work. James Hughes, the regional administrator for the State Court Administrative Office testified that he spent more time with Respondent because of delays and docket management problems than he had ever spent with any other judge in his region. There was evidence that Respondent had a far higher number of cases over two years old than other similarly situated judges, and that Respondent had a much larger backlog of old cases than other similarly situated judges.

Other jurisdictions have imposed discipline for repeated, unjustified delay in deciding cases. Discipline has extended to include removal in cases with other exacerbating circumstances. *Matter of Lenney*, 522 NE2d 38 (NY, 1988). *See also: Matter of Anderson*, 252 NW2d 592 (Minn, 1977).

In *Seitz*, the Supreme Court also condemned failure to file required reports despite repeated reminders from the State Court Administrative Office:

> The Commission found that this behavior constituted conduct clearly prejudicial to the administration of justice contrary to MCR 9.205(C)(4); a failure to discharge administrative responsibilities diligently and to facilitate the performance of the administrative responsibilities of court officials contrary to Canon 3B(1) of the Code of Judicial Conduct, *see In re Carstensen*, 316 NW2d 889 (Iowa, 1981); and a violation of MCR 8.107.
>
> This is another factually undisputed charge of misconduct for failure to comply with an explicit routine administrative task. We agree with the Commission's finding of misconduct and accept the recommendation that it should be the subject of disciplinary action. [*Seitz*, *supra,* 441 Mich 622-623 (citations omitted).]

In Matter of Dearman, the South Carolina Supreme Court removed a magistrate for habitual intemperance. 287 SE2d 921; 277 SC 394 (1982). In the present matter, Respondent

was also charged with habitual intemperance, a charge which the Master sustained. Respondent is guilty of repeated serious misconduct which requires his removal from office.

B. Costs

As previously noted, the Supreme Court has stated that the factors specifically enumerated in *Brown* were not exclusive. The Commission can consider other "appropriate standards." From time-to-time, the Commission has recommended that costs be imposed against respondents, but has thus far not adopted any standard for doing so.

In Michigan, there is no specific court rule or statutory provision for imposing costs or restitution in judicial disciplinary matters. However, the Supreme Court has done so on several occasions. In imposing discipline in the very first formal complaint, over thirty years ago,[2] the Court imposed $1,000 in costs as partial reimbursement for the cost of the proceedings, in addition to the public censure of the respondent.[3] In Formal Complaint No. 5, *In re Edgar*, and Formal Complaint No. 6, *In re Blodgett*, the Court ordered public censures and $1,500 and $1,000 costs, respectively, as partial reimbursement of the costs of the proceedings.[4] *See too, In re Cooley,* 454 Mich 1215 (1997). More recently, the Court ordered the respondents in *In re Trudel*, 468 Mich 1244 (2003) and in *In re Thompson*, ___ Mich ___ (MSC Docket No. 124399, released July 9, 2004) to pay the Commission costs in the amounts of $12,777.33 and $11,117.32, respectively.

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[2] Formal Complaint No 1, *In re Somers*, 384 Mich 320 (1971).

[3] The Court ordered that the costs be paid to the Clerk of the Supreme Court. The order for costs was apparently entered separately from the Court's opinion, as it is not included in the text of the opinion found at 384 Mich 320. Accordingly, a copy of the Court's order is appended to this Decision as Attachment B.

[4] Interestingly, these two cases were never published in the official volumes of the Michigan Reporter. In both cases, the Court ordered the respondent to appear before it "for the administration of censure and the determination of punishment." Copies of both orders are appended as Attachments C and D respectively.

In so recommending, the Commission adopts the following standard for determining whether to impose costs and expenses as a part of a disciplinary action: conduct involving fraud, deceit, intentional misrepresentation, or misleading statements to the Commission, its investigators, the Master or the Supreme Court.

This standard was implicit in cases such as *Trudel, supra*, 468 Mich 1244, where the Respondent falsely applied for worker's compensation benefits, and used his sick time to treat himself to extended vacations in California. That type of fraud on the public warranted the imposition of costs in that case.

Similarly, in *In re Chrzanowski, supra*, 465 Mich 468, the respondent was suspended without pay, but no further costs were ordered. Although the respondent made false statements to the police in the course of the investigation of a murder case, she corrected those false statements within a matter of days, and there was never any reason to believe that the investigatory process was delayed or otherwise interfered with. In *In re Thompson*, __ Mich __ (MSC Docket No. 124399, released July 9, 2004), *supra*, the Court found that the respondent had made misrepresentations to a state agency and to the Michigan Supreme Court. His statements were purposely misleading and false, and our Supreme Court concluded that costs were appropriate.

Respondent argues here, as have respondent judges in other jurisdictions, that imposition of financial sanctions is specifically prohibited if not provided by statute. The courts have routinely rejected such positions. In a leading case, *Matter of Cieminski*, 270 NW2d 321 (ND 1978), Judge Cieminski contended the North Dakota Supreme Court lacked authority to impose costs against him in light of a statute prohibiting an award of costs, that costs could be awarded

only to the extent authorized by statute, and in the absence of a statute governing disciplinary cases, no costs could be assessed. The North Dakota Supreme Court found:

> Disciplinary proceedings are neither civil nor criminal, consequently, the rules pertaining to either do not necessarily apply. Specifically, Rule 54(e), NDRCivP, pertaining to costs and disbursements, does not apply for several reasons. Initially, Rule 54(e) is predicated on the common practice that the prevailing party is entitled to its costs and disbursements. As stated earlier, ***assessment of costs is a part of the disciplinary action and is not the same as awarding costs to either party*** as prohibited by sec. 27-23-11, NDCC, or as contemplated by Rule 54(e), NDRCivP. *Id.* at 334-335. [*Id.,* Emphasis added.]

The court further noted:

> The assessment of costs as a part of a disciplinary action is more than a censure, less than a suspension, but has a useful purpose and serves as a deterrent to conduct not in harmony with the Code of Judicial Conduct. [*Id*, at 335.]

In drawing its conclusion, the court cited the well-established body of law holding that authorization to censure or remove implicitly includes the authority to impose lesser sanctions and considered the imposition of costs a lesser-included sanction. *Id* at 333-334.

We respectfully disagree with our dissenting colleagues' suggestion that the word "censure" in Const 1963, art 6, § 30, cannot be read as broadly as the word "discipline" used in North Dakota constitutional and statutory law. *Cieminski*, *supra*. Const 1963, art 6, § 30, expressly gives our Supreme court the power to "censure," "suspend," "retire or remove" a judge for misconduct or failure to perform his duties, language that contemplates various forms of discipline. As the partial dissent recognizes, our Supreme Court has imposed costs as part of the overall sanction in other cases, cases which we believe involved conduct less harmful to the judiciary than that found here.

The Commission agrees that the imposition of costs on a respondent is part of the sanction itself, not a collateral measure that needs specific legislative or court rule authorization. The Commission accepts the affidavit of Commission senior administrative assistant, Camella Thompson, to establish the amount of costs incurred in the prosecution of this matter. No objection was offered to the affidavit, and it was received into evidence. Accordingly, the Commission takes judicial notice of its records and determines that it has incurred expenses in the amount of $22,572.76 solely as the result of having to prosecute this matter to conclusion before the master. Inasmuch as the master found that Respondent had committed judicial misconduct, a finding with which the Commission agrees, and the Commission is making a recommendation of discipline to the Supreme Court, Respondent is the party who should bear the cost of prosecution.

V. RECOMMENDATION

It is recommended that the Michigan Supreme Court enter an order finding judicial misconduct as set forth above, including misconduct in office and conduct clearly prejudicial to the administration of justice, **REMOVE** the Honorable James Noecker from the office of judge of the 45th circuit court, and order him to reimburse the Commission for the actual costs stemming from this case in the amount of $22,572.76.

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